***District Council 37, Local 461 and Local 508*, 61 OCB 2 (BCB 1998) [Decision No. B-2-98 (Arb)], called into question, *see City of New York v. DeCosta*, 95 N.Y.2d 273, 716 N.Y.S.2d 353 (2000).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration, :
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-between- :
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THE CITY OF NEW YORK, :
Petitioner, :
:
-and- :
:
DISTRICT COUNCIL 37, LOCAL 461 and :
LOCAL 508, :
Respondents. :
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Decision No. B-2-98
Docket No. BCB-1896-97
(A-6611-97)

DECISION AND ORDER

On March 21, 1997, the City of New York ("the City"), appearing by its Office of Labor Relations, filed a Petition Challenging the Arbitrability of a grievance which is the subject of a Request for Arbitration filed by District Council 37, Local 461 and 508 ("the Union"). The issue sought to be arbitrated by the Union is:

> Whether the employer violated the collective bargaining agreement in the conduct of employee interviews by failing to 1) give proper advance notice of the interview; 2) inform the employees of the right to union representation or legal counsel; 3) afford union members the right of union representation or legal counsel; 4) conduct the interviews in an appropriate setting.

The Union filed its answer to the City's petition on April 22, 1997, and the City's reply followed on May 22, 1997. On June 2, 1997, the Union filed a request for permission to submit a sur-reply in this matter, asserting that a decision of the Court of Appeals, issued after the Union filed its answer, would be included. The City filed its objection to this request on May 30, 1997.

On June 9, 1997, the Union submitted this sur-reply after being informed by the trial examiner, assigned to this matter, that said sur-reply would be considered only if the Board of Collective Bargaining ("the Board ") found that special circumstances warranted its inclusion in the record.

RELEVANT CONTRACTUAL AND STATUTORY PROVISIONS

SEASONAL UNIT AGREEMENT

ARTICLE VI - GRIEVANCE PROCEDURE

Section 1.

The term "Grievance" shall mean:

a. A dispute concerning the application or interpretation of this Agreement;

b. A claimed violation ... of the rules or regulations, written policy or orders of the Employer ...

Section 2.

* * *

Step IV

An appeal from an unsatisfactory determination at Step III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration ...

ARTICLE XXIII-LIFEGUARD PERSONNEL PRACTICES

* * *

Section 11.

When an employee employed at least one year as a Lifeguard or Chief Lifeguard is summoned to an interview which may lead to a disciplinary action and which is conducted by someone outside the normal supervisory chain of command, the following procedure shall apply:

a. Lifeguard personnel who are summoned to the appropriate office of their agency shall be notified, whenever feasible, in writing at least two (2) work days in advance of the day on which the interview or hearing is to be held, and a statement of the reason for the summons shall be attached, except where an emergency is present or where considerations of confidentiality are involved.

c. Whenever such Lifeguard personnel is summoned for an interview or hearing for the record which may lead to disciplinary action, the Lifeguard

personnel shall be entitled to be accompanied by a Union representative or a lawyer, and he or she shall be informed of this right. Upon the request of the Lifeguard personnel, the Inspector General, in his or her discretion, may agree to the Lifeguard personnel being accompanied by a lawyer or Union representative. Such permission shall not be unreasonably denied. If a statement is taken, the Lifeguard personnel shall be entitled to a copy.

d. Whenever possible, such hearings and interviews shall be held in physical surroundings which are conducive to privacy and confidentiality.

COLLECTIVE BARGAINING AGREEMENT / CITYWIDE AGREEMENT

ARTICLE IX

Section 19.

When a permanent employee is summoned to an interview which may lead to a disciplinary action and which is conducted by someone outside the normal supervisory chain of command, the following procedure shall apply:

a. Employees who are summoned to the appropriate office of their agency shall be notified, whenever feasible, in writing at least two (2) work days in advance of the day on which the interview or hearing is to be held, and a statement of the reason for the summons shall be attached, except where an emergency is present or where considerations of confidentiality are involved.

b. Whenever such an employee is summoned for an interview or hearing for the record which may lead to disciplinary action, the employee shall be entitled to be accompanied by a Union representation or a lawyer, and the employee shall be informed of this right. Upon the request of the employee and at the discretion of the Inspector General, the Inspector General may agree to the employee being accompanied by lawyer and a Union representative. Such permission shall not be unreasonably denied. If a statement is taken, the employee shall be entitled to a copy.

c. Wherever possible, such hearings and interviews shall be held in physical surroundings which are conducive to privacy and confidentiality.

d. This Section shall not alter the provisions of any existing unit Agreement which contains a beneficial procedure.

NEW YORK CITY CHARTER

CHAPTER 34

DEPARTMENT OF INVESTIGATION

§803. **Powers and duties**. a. The commissioner shall make any investigation directed by the mayor or the council.
b. The commissioner is authorized and empowered to make any study or investigation which in his opinion may be in the best interest of the City, including, but not limited to, investigations of the affairs, functions, accounts, methods, personnel, or efficiency of any agency.
c. For any investigation made pursuant to this section, the commissioner shall prepare a written report or statement of findings and shall forward a copy of such report or statement to the requesting party, if any. In the event that the matter investigated involves or may involve allegations of criminal conduct, the commissioner, upon completion of the investigation, shall also forward a copy of his written report, or statement of findings to the appropriate prosecuting attorney, or, in the event the matter investigated involves or may involve a conflict of interest or unethical conduct, to the board of ethics.
d. The jurisdiction of the commissioner shall extend to any agency, officer, or employee of the city, or any person or entity doing business with the city, or any person or entity who is paid or receives money from or through the city or agency of the city.

* * *

§805. **Conduct of investigations.** a. For the purpose of ascertaining facts in connection with any study or investigation authorized by this chapter, the commissioner and each deputy shall have full power to compel the attendance of witnesses, to administer oaths, and to examine such persons as he may deem necessary.
b. The commissioner or any agent or employee of the department duly designated in writing by him for such purposes may administer oaths or affirmations, examine witnesses in public or private hearing, receive evidence and preside at or conduct any such study or investigation.

NEW YORK CITY CHARTER
CHAPTER 49
OFFICERS AND EMPLOYEES

§1128. **Interference with investigation.** a. No person, vent [sic]. seek to prevent, interfere with, obstruct, or otherwise hinder any investigation being conducted pursuant to the charter. Any violation of this section shall constitute cause for suspension or removal from office or employment.
b. Full cooperation with the investigation shall be afforded by every officer or employee of the city or other persons.

BACKGROUND

The City and District Council 37 are parties to a collective bargaining agreement referred to as the Seasonal Unit Agreement ("Agreement"). The Agreement provides the terms and conditions of employment of Lifeguards, Chief Lifeguards and other City employees. The City and Union are also parties to the Citywide agreement.

As a result of several interviews conducted by the DOI, of individuals seasonally employed by the New York City Department of Parks and Recreation ("the City" or the "Parks Department"),[1] the Union filed a Step III grievance on July 11, 1996. In this grievance the Union alleged that the City committed :

> A violation of Article XXIII Section 11(A) and (B) [of the Seasonal Unit Agreement] by failing to provide union members with the opportunity to have representation of a lawyer or union reps prior to conducting interviews of our members. DOI is interviewing members without (1) informing members of right to representation (2) giving two day prior written notice including reason for interview (3) failing to conduct interviews in a confidential setting.

On February 12, 1997, the City denied the grievance, stating that the grievance concerned the conduct of the DOI and not that of the Parks Department, and therefore no violation was stated. On February 27, 1997, the Union filed a Request for Arbitration containing the allegations quoted above. Among other things, the Union requested that the DOI cease and desist its interviews and comply with the provisions of the Agreement.

POSITIONS OF THE PARTIES

City's Position

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[1] According to the Union two of the interviews at issue herein were conducted in early July, 1996. The city denies knowledge and information sufficient to form a belief as to this allegation and contends that "some interviews may have been conducted during the off-season, or from the week following Labor Day to the week prior to Memorial Day."

The City contends that the Union's attempt to place the investigations of DOI in an arbitral forum, would violate public policy and "circumvent DOI's statutorily conferred investigatory and law enforcement powers pursuant to the New York State General City Law sec. 20(21), the City Charter and Mayoral Executive Orders". In support of this position, the City cites City of New York v. MacDonald[2], noting that there, the court found that arbitration may not be imposed upon the Police Commissioner since §434 of the New York City Charter allows the Commissioner to determine and impose discipline. The City analogizes MacDonald with the instant matter, claiming that here, DOI has the right to conduct investigations and "[a]rbitration of the instant grievance would infringe upon DOI's ability to conduct such investigations."

The City notes that public policy, whether explicitly or implicitly stated in statutes or decisional law, may restrict the freedom to arbitrate. It contends that "there is a clear and compelling public policy implicit in Chapter 34 of the New York Charter ... that criminal investigations should not be jeopardized or imposed by the presence of an interested third party. The City contends that the procedural requirements of Section 11 of Article XXIII of the Agreement, requiring that employees be accompanied by a Union representative and a lawyer during questioning, " would eviscerate the DOI's ability to efficiently detect corruption or other criminal misconduct and thus prevent DOI from effectively developing a criminal case in accord with sound investigatory and prosecutorial principles." According to the City, because the representative is bound to protect the interest of *all* union members, the presence of a union

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[2] N.Y. Co. Supreme Court 4/14/92; Modified 607 N.Y.S.2d 24, 145 LRRM 2894 (1st Dep't 1994); Appeal Denied 83 N.Y.2d 759, 615 N.Y.S.2d 876 (1994). (Annulling Decision No. B-42-91).

representative would compromise the secrecy of the proceeding and might inhibit the person from testifying freely or providing information about other members of the Union who may have committed crimes.

The City maintains that seasonal employees in the off-season are not active employees within the meaning of the Agreement. The City also contends that to the extent that the grievants represented by the Union were seasonal employees holding 'non-active' positions at the time DOI conducted the interviews at issue herein, the Union lacks standing to file the instant Request for Arbitration. The City claims that based upon information and belief, "some of the individuals represented by the Union ... were neither employees nor members of the bargaining unit when the investigative activities occurred." As authority for this position the City notes that Article XXII of the Agreement provides that the season for Lifeguards commences one week before Memorial Day. Since the grievants are seasonal employees, asserts the City, and the interviews may have been conducted in the off-season, the grievants are not members of the bargaining unit. Additionally, contends the City, individuals interviewed during the off-season were not paying dues by dues checkoff or otherwise paying dues to the Union, thus they can not avail themselves of benefits available to Union members. The City refers to several cases of the Public Employee Relations Board (PERB) for the proposition that the Union has no standing to represent individuals who are not members of the bargaining unit.[3]

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[3] *See e.g.* Troy Uniformed Firefighters Association, Local 2304, IAFF, 10 PERB 3015; Dunkirk Teachers Association, NYSUT/AFT, AFL-CIO, Local 2611 v. Dunkirk City School District, 13 PERB 3060; Somers Central School District v. Somers Faculty Association, 9 PERB 3014; Triborough Bridge and Tunnel Authority v. Bridge and Tunnel Officers Benevolent Association, Inc., 15 PERB 3124.

The City further asserts that the Step III grievance and the Request for Arbitration did not specify which interviews occurred, the individuals interviewed, or when the interviews took place. The City contends that the Union should include the facts and circumstance surrounding the claimed violation in its grievance and not wait for a hearing to provide this information. The City claims that because the Union did not specify the circumstances underlying the Step III grievance and the Request for Arbitration, it placed the City at a disadvantage in responding to the allegations and "failed to establish a sufficient nexus between the source of right to arbitrate and the alleged wrong." The City cites Decisions No. B-54-87 and B-40-88 for the proposition that pleading the specific facts and circumstances underlying the grievance "is necessary in order that a sufficient nexus between the contract provision and the alleged violation be established."

Finally, the City claims that Section 75 of the Civil Service Law, relied upon by the Union in its answer, does not apply to criminal investigations conducted by DOI. According to legislative history, argues the City, the requirement of union representation, indicated in that provision, clearly refers to disciplinary proceedings and was "intended to address disciplinary actions only" not proceedings by DOI, which is not responsible for employee disciplinary actions, but is instead responsible for conducting criminal investigations.

Union's Position

According to the Union, no public policy of the State or City of New York precludes arbitration of the controversy at issue herein. The Union claims that the City has failed to enumerate, with any specificity, how affording City employees due process rights of notice, representation and privacy will prevent DOI from fulfilling its statutory mission of rooting out

corruption and criminal conduct. According to the Union, the DOI should be able to ask questions and gather information while respecting the right of City employees. It adds that "the City's interest in stemming employee corruption and criminal conduct - while undoubtedly important - cannot shield it from the obligation to ... arbitrate controversies concerning important due process rights."

The Union asserts that there is no explicit or implicit prohibition of arbitration expressed in the Charter. The Union argues that the City's reference to the Court of Appeals case, City of New York v. MacDonald, does not support the City's position since there, the court found that the "applicable statutes and charter provisions disclosed an explicit legislative intent and public policy to have the discipline of police officers left in the exclusive realm of the Police Commissioner." Here, argues the Union, there exists no such intent to create a public policy against due process rights.

Regarding the City's standing argument, the Union asserts that the interviews in question were conducted during the season, specifically, in July, and the grievance was filed during the season as well. The Union contends that even if the interviews were conducted in the off season, the subject of the interviews were work related and that if they were not, DOI would have had no authority to question the grievants. According to the Union, the grievants were subject to the interviews as employees and were thus union members, protected by the collective bargaining agreement. The Union adds that the Agreement provides a detailed procedure[4] by which

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[4] Article XIX, §2 of the Agreement provides, inter alia, that at the end of each season the names of those Lifeguards who successfully complete the season shall be placed on a seniority list. Each candidate on the list will receive a communication during March of each year inquiring as to their availability for the forthcoming season.

Lifeguards are notified and rehired for the next summer. The Union argues that since lifeguard personnel "have an expectation of returning to the Parks Department" they maintain a relationship with the employer through the off-season and could "have fairly assumed that they had to cooperate with DOI during or after the season if they wished to retain their right to re-employment. They could also fairly assume that the protections afforded under the contract remain in force and effect."

Regarding the City's argument that the Union's grievance lacks specificity and therefore fails to establish sufficient nexus between the source of the right to arbitrate and the alleged wrong, the Union notes that the City denied the Union its right to a hearing, where the full facts and circumstances of the grievance would have been discussed, and therefore can not now raise lack of specificity as a challenge to arbitrability

The Union cites Board of Educ. v. Bellmore-Merrick United Secondary Teachers, 39 N.Y.2d 167, 383 N.Y.S.2d 242 (1976), for the proposition that Courts have recognized that procedural protections are appropriate subjects of arbitration. Furthermore, notes the Union, the New York Civil Service Law §75.2, states that "an employee who at the time of questioning appears to be potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter and shall be notified in advance, in writing, of such right ...." According to the Union this provision exemplifies New York State's "strong, clear, and explicit public policy [of favoring] due process protections for public employees interviewed where there is a potential for disciplinary action.

Finally, citing Decision No. B-8-74, the Union notes that the Board of Collective

Bargaining (the "Board") leaves the determination of whether a contract provision applies to a particular employee to the arbitrator.

DISCUSSION

The Union's sur-reply includes a reference to a Court of Appeals case [5] that, while not completely on point, aids in our analysis of whether public policy exempts the City from arbitration in this case. Accordingly, to the extent that the sur-reply addresses this issue, it will be included in the record.

In considering challenges to arbitrability, the Board must determine whether the parties agreed to arbitrate their disputes and whether a *prima facie* relationship exists between the act complained of and the source of the alleged right to seek redress through arbitration.[6] According to the City, because the Union's grievance does not specify which interviews occurred, the individuals interviewed, or when the interviews took place, the Union failed to establish a sufficient nexus between the violations alleged by the Union[7] and Article XXIII, Section 19, of the parties' Agreement. We disagree.

In Decision B-54-87, a case cited by the City in support of this position, we noted that where we cannot find that any relationship exists between the grievance presented and any of the matters enumerated in the provision alleged to be violated, the Request for arbitration must be denied. There we found that the union failed to specify facts and circumstances which establish a

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[5] *See* Professional, Clerical, Technical Employees Association and Buffalo Board of Education, 90 N.Y.2d 364, 683 N.E.2d 733, 660 N.Y.S.2d 827, 829 (1997).

[6] *E.g.*, Decision No. B-19-90.

[7] *See* the Request for Arbitration and the Step III grievance Supra at 1 and 5, respectively

connection between the wrong alleged and the provision alleged to be violated.[8] In Decision No. B-40-88, we also denied the Union's Request for Arbitration where it was found that the union failed to establish an arguable relationship between the alleged wrong and the collective bargaining agreement.

These cases are distinguishable from the instant matter. Here, there is a clear connection between an alleged failure to provide union members with the opportunity to have the representation of a lawyer, and the other alleged violations, and Article XXIII, Section 19, of the Agreement. Furthermore we find that the present grievance is within the contractual definition of grievances that the parties agreed to arbitrate.[9]

In the City's Petition it also asserts that arbitration of the grievance herein would violate public policy and prevent DOI from carrying out its statutorily mandated responsibilities. According to the City, there is a "clear and compelling public policy, implicit in Chapter 34 of the New York Charter[10]" which exempts it from arbitration. In light of this argument, we must determine whether public policy, relating to the functioning of the DOI, precludes the arbitration of a dispute that is otherwise clearly within the scope of the City's and the Union's agreement to arbitrate.

In following New York court decisions, we have held that "absent clear prohibitions

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[8] *See* Decision No. B-54-87 at 6.

[9] *See* Supra at 2, Article VI, Section 1 and 2, where the parties agree that disputes concerning the application or interpretation of the Agreement and claimed violations of the rules of the employer are grievances subject to arbitration.

[10] ... that criminal investigations should not be jeopardized ... by the presence of a third party,

derived from constitution, statute, or controlling decisional law, arbitration under the terms of a collective agreement is a permissible forum for resolving disputes ..."[11] Courts have also noted that the public policy must be strong, identifiable and absolutely prohibit the particular issue from being submitted to arbitration.[12] It follows, then, that the courts have denied arbitration when it has been found that statutory provisions would be contravened by arbitration.[13]

In accordance with our decisional law and the above noted Court decisions, supervening arbitration on a particular subject matter, even if arbitration was agreed upon and is required by the collective bargaining agreement, is unenforceable as against public policy when a statute clearly grants an entity the exclusive power over that matter. However, unless a statutory provision clearly preempts arbitration on a particular subject matter, arbitration, as required by

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[11] *See* Decisions No. B-46-97 at 14; B-10-85 at 23; Professional, Clerical, Technical Employees Association and Buffalo Board of Education, *supra* at note 5 (finding that matters relating to terms and conditions of employment are subject to collective bargaining and subsequent arbitral resolution and that this policy is only limited by narrow exceptions such as a showing of "plain and clear prohibitions found in statute or decisional law [or] considerations of objectively demonstrable public policy"). *See also* Port Jefferson Station Teachers Association v. Brookhaven-Comsequa Union Free School District, 411 N.Y.S. 2d 1, 2 (1978).

[12] *See, e.g.*, Board of Education of the Arlington Central School District v. Arlington Teachers Association, 78 N.Y.2d 33, 571 N.Y.S.2d 425 (1991); Enlarged City School District of Troy v. Troy Teachers Association, 69 N.Y.2d 905, 516 N.Y.S.2d 195 (1987).

[13] *See* Honeoye Falls - Lima Central School District v. Honeoye Falls - Lima Education Association, 49 N.Y.2d 732 (1980). *See also* City of New York v. MacDonald, 607 N.Y.S. 2d 24 (1994), where, in a scope of bargaining dispute, the Patrolman's Benevolent Association sought to bargain on establishing arbitral disciplinary procedures for tenured officers and the court found that the PBA's demand was a prohibited subject of bargaining since statutory provisions authorized the Police Commissioner to determine and impose discipline. *See also* City of New York v. Uniformed Firefighters Association, Local 95, IAFF, AFL-CIO, 450 N.Y.S.2d 829 (App. Div. 1982) (finding that an arbitrator's issuance of an award contravened public policy because the city charter and statute expressly granted the employer the exclusive authority over the issue arbitrated).

the party's collective bargaining agreement, is permissible and will not be stayed.

Our dissenting colleagues appear to assume that a finding of arbitrability in this case is the equivalent of upholding the Union's claim. It is not. The Board expresses no view as to the merit of the Union's grievance.[14]

. We are not persuaded that any public policy, implicit or explicit, exempts DOI from compliance with the terms of Article XXIII of the agreement. The City Charter grants DOI the power to conduct investigations throughout the City. Under Chapter 34, §805 of the City Charter, the DOI is granted the power "to compel the attendance of witnesses, to administer oaths, and to examine such persons as [it] deems necessary." Chapter 49, § 1128 of the City Charter prevents interference, obstruction or hindrance and requires "full cooperation with the investigation." In reading these sections of the City Charter, as well as the other statutes cited by the City, we find no provisions which, on their face, supervene, or are necessarily inconsistent with, the rights contained in any section of Article XXIII of the Agreement.

DOI may still compel the attendance of witnesses, administer oaths, and examine such persons as it deems necessary. Additionally, the City has not persuaded us that an employee's accompaniment by a union representative is clearly prohibited by any of the applicable statutory provisions. Nowhere in the applicable statutory provisions are the procedural safeguards and rights granted to the Union members, under the Agreement, expressly supervened. In fact, New York courts addressing similar matters, have stated that procedural safeguards such as these do not infringe upon any substantive aspect of an entity's responsibilities or authority and therefore

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[14] *See* Decision No. B-18-80 at 10, where we note that a decision of arbitrability is not a reflection of our view of the merits of an underlying dispute.

do not violate public policy.[15] The provisions relied upon by the City grant DOI the power to conduct investigations of public employees and protects against the interference with those investigations; they do not, in our view, grant DOI exclusive power over the establishment of procedural safeguards and other rights of employees summoned to be questioned by DOI. Furthermore, it is well established that the "impartial arbitration of grievances between municipal agencies and certified employee organizations" is favored and encouraged.[16]

The City cites City of New York v. MacDonald in support of its public policy argument. It argues that the Court's rationale in this decision is applicable to the instant matter; we do not agree. As noted in Decision B-46-97, the subject of arbitration in the MacDonald case was one that, according to the Charter, was exclusively within the discretion of the Police Commissioner. The Court there found that where a statutory grant of exclusive authority over a particular matter exists, arbitration on that matter must be stayed, since allowing arbitration would contravene the statute and violate public policy.[17] Since the question in the instant matter is whether a claimed

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[15] See Broadalbin Teachers Association v. Broadalbin, 469 N.Y.S.2d 217, 219 (A.D. 3 Dept. 1983) (involving the evaluation provision of a collective bargaining agreement between the teachers' union and the school district. There, the court found that the provision "does not infringe upon any substantive aspect of the district's responsibility and authority to make tenure decisions. Rather it merely imposes certain procedural requirements which must be complied with...." The Court added that "[s]uch bargained-for supplemental procedural steps ... are not violative of public policy."

[16] *See* Section 12-302 of the New York City Collective Bargaining Law. *See also* Dep't of Sanitation v. MacDonald, 87 N.Y.2d 650, 642 N.Y.S.2d 156 (1996)(Affirming Decision No. B-12-93 and confirming the existence of this policy and the authority of the Board to implement the policy in determining questions of arbitrability).

[17] *See* Decision B-46-97 at 16; City of New York v. MacDonald, N.Y. Co. Supreme Court 4/14/92; Modified 607 N.Y.S.2d 24, 145 LRRM 2894 (1st Dep't 1994); Appeal Denied 83 N.Y.2d 759, 615 N.Y.S.2d 876 (1994). (Annulling Decision No. B-42-91).

violation of Article XXIII of the Agreement is a matter explicitly or implicitly precluded or preempted from arbitration by the City Charter,[18] and not whether DOI has the power to investigate, which is expressly granted by the Charter, the matter before us is not analogous to the MacDonald case, as contended by the City.

The City claims that since the interviews occurred in the off-season the individuals interviewed are not members of the bargaining unit and the Union lacks standing to file the instant Request for Arbitration; the Union, on the other hand, contends that the interviews occurred during the season.

The Union Recognition Section of the Agreement provides that the Union is the sole representative for the titles at issue herein. It notes that these "employees of the Employer, wherever employed, whether full-time, part-time per annum, hourly or per diem, are exclusively represented by the Union". The City has not alleged that the individuals in question were discharged or officially resigned from the City's employ. Instead it argues that by virtue of their seasonal employment and the possibility that the interviews may have occurred outside of the season, they are not employees. From our reading of the Recognition Section, seasonal employment or part time employment does not jeopardize an individual's right to union representation. In addition, the record is unclear as to whether these individuals were interviewed during the off-season. In any event, we note that the Lifeguards whose names appear on the seniority list maintain a relationship with the City during the off-season. The question of whether

[18] The City also states in its pleadings that Mayoral Executive Orders support its contention that arbitration on the instant grievance would interfere with its statutory responsibilities, however, the City fails to identify these Executive Orders in its petition or its reply.

these individuals were interviewed during the season and, if not, whether this would affect their status under the collective bargaining agreement are questions appropriately determined by an arbitrator.

We find a nexus between the grievance alleged and the parties' agreement to arbitrate their disputes. We also find that the matter of whether the Agreement applies to these grievants, when called to be questioned by DOI, is one for an arbitrator to decide.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed herein, by the City of New York be, and the same hereby is, denied, and it is further,

ORDERED, that the request for arbitration filed herein by District Council 37, and the same hereby is, granted.

Dated: January 27, 1998
New York, New York

STEVEN DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DISSENT

For the reasons set forth in our dissent in B-46-97 as well as the reasons set forth below, Board members Richard Wilsker and Saul G. Kramer respectfully dissent.

The Union's grievance should not be arbitrated. Public policy demands that the Department of Investigation's (DOI's) inquiries into allegations of corruption and criminal misconduct by City employees and within City agencies remain unhampered by and free of the restraints imposed by the contractual provisions at issue herein. The Board of Collective Bargaining, as well as the courts, have recognized the importance of considering public policy when deciding issues of arbitrability. See, BCB Decision No. B-10-85. By dismissing the City's

petition challenging arbitrability, the Board is ultimately empowering an arbitrator to determine the manner in which criminal investigations are conducted by DOI, thereby impermissibly circumscribing DOI's investigatory and law enforcement powers as statutorily conferred pursuant to the New York State General City Law, sec. 20(21), the City Charter and Mayoral Executive Orders. The majority's opinion reflects a fundamental misperception of the responsibility, mandate and authority of DOI.

DOI is an independently-functioning law enforcement agency charged by statute with the singular and significant responsibility of investigating, inter alia, allegations of corrupt or other criminal activity by those who work for, or have dealings with the City. See generally, Charter §803; Executive Orders 16, 78, 105. By the nature of its mandate, DOI must, in order to effectively fulfill its mission, operate independently of the City agencies which it is charged to investigate and for whose integrity it is ultimately accountable.[19]

As an independent law enforcement agency, DOI is specifically required by statute to refer the findings of its completed criminal investigations to appropriate prosecuting attorneys. See, City Charter §803(c). Many of those investigations are in fact conducted jointly with federal and local prosecutors and law enforcement agencies, utilizing the expertise of the many New York City Police Detectives who are permanently assigned to DOI as part of its staff.

Subjecting DOI's law enforcement authority to bargained-for contractual limitations

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[19] Indeed, in 1986, after the notorious City corruption scandals, then Mayor Koch recognized the critical need for the independence of the Inspectors General from the agencies which they are charged to monitor and investigate. By Executive Order 105 he brought the Inspectors General within the ambit and authority of DOI, making them DOI staff answerable solely to the Commissioner of Investigation rather than to the heads of the very agencies over which they had investigatory responsibility.

which mandate, at the election of the interviewee, the presence of potentially interested third-party union representatives at investigative hearings can only serve to impede DOI's capability both to fulfill its statutory responsibilities and to work effectively with other law enforcement agencies which are not subject to such restrictions. See, Seasonal Unit Agreement, Article XXIII, Sec. 11.

The permitted presence of a union representative at DOI conducted criminal investigative proceedings can only hamper DOI's law enforcement function and carries the potential of adversely impacting the progress, integrity and outcome of the agency's investigation. In virtually every case, were a union representative to attend an employee interview, he might face an insurmountable conflict, between the best interests of the revealing employee and the representative's loyalties to the union, its membership and its staff, with regard to the information he gained by virtue of his presence. Such conflict exists in any case in which the interviewee has the potential to provide adverse information about another union member.

Unlike an attorney, who is bound both by statute and the Canons of Ethics to the single-minded protection and promotion of the interests of his client, a union representative owes an additional and potentially conflicting duty to his union. This more general loyalty may tempt the union representative to disseminate among the union membership or hierarchy, information learned in an interview he has attended, even if such disclosure is contrary to the best interests of the interviewee. In fact, the disclosure of such information may subject the interviewed employee to threats and/or other pressures from persons seeking to obstruct the investigation and may allow subsequent interviewees to tailor their testimony corruptly in frustration of legitimate law enforcement efforts.

From another perspective, recognition of the union representative's divided loyalties, and the threat they pose to the confidentiality of the proceedings, may serve to intimidate the honest employee and chill his or her tendency towards candor and truthfulness in the interview process.

In illustration of the issue, the United States Attorney for the Southern District of New York, is presently prosecuting a federal labor racketeering case against the former president of the Transit Police Benevolent Association ("TPBA"). United States v. Ron Reale, et al., S5 96 Cr. 1069 (DAB). The prosecution in that case, which alleges, among other charges, the receipt of kickbacks by union officials, has relied in significant part on the testimony of lower level union officials who were themselves involved in the charged offenses. While DOI may have played no active role in that investigation and prosecution, it is not difficult to imagine the consequences that might have followed, if there had been a union representative present at the debriefing interview sessions with those witnesses.

It is in recognition of these dangers that DOI, when interviewing City employees, permits the person interviewed to be accompanied only by his or her legal counsel. This practice fully protects the due process rights of the employee while accommodating and promoting the substantial public interest in sound, effective and cooperative law enforcement efforts.

The detection of municipal corruption and criminal misconduct is the statutory mandate and responsibility of DOI. To permit arbitration herein, and to countenance the risk that DOI might be constrained by an expansive interpretation of the contractual provisions here at issue, would be to impede the investigatory process and eviscerate DOI's capacity to meet its statutory obligations to the City of New York and the public at large.

The majority is simply incorrect that public policy may only prevent the arbitrability of a

grievance where, “a statutory provision clearly preempts arbitration on a particular matter.” See pages 13-14 of majority opinion.

Indeed in Susquehanna Valley Central School District at Conklin and Susquehanna Valley Teachers Association, 376 N.Y.S.2d 427, 429 (1975), the New York Court of Appeals stated that "[p]ublic policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may also restrict the freedom to arbitrate." Ultimately, the key to the analysis is balancing the freedom to contract against the governmental interests and public concerns that may be involved. Id. The Court of Appeals has repeatedly held that a public policy prohibition on collective bargaining may be derived from the plain and clear implication of the statutory scheme rather than from an explicit prohibition in a statute. Webster Central School District v. PERB, 75 N.Y.2d 619, 627 (1990); Cohoes City School District v. Cohoes Teachers Association, 40 N.Y.2d 774, 778 (1976). Furthermore, in City of New York v. McDonald, 201 AD2d 258, 259-60 (1st Dept.),app denied,83 NY2d 759 (1994), the Appellate Division, First Department held that even rules of the New York City Personnel Director may establish public policy such that arbitration in an area covered by those rules could not be compelled. In the case before us, there is a clear and compelling public policy implicit in Chapter 34 of the New York City Charter, and embodied in sound law enforcement and prosecutorial principles, that demand arbitration be stayed.

Both the City of New York v. MacDonald and the instant matter involve the accountability of employees of the City for their actions. McDonald involved accountability for violations of Police Department rules and regulations, and the ultimate accountability of City officials for the actions of police officers. The instant matter involves the accountability of City

employees for criminal conduct and the City's ultimate responsibility for ensuring that public servants do not engage in fraud, corruption or criminal conduct. Therefore, the result in the instant matter should be consistent with the Court's finding in City of New York v. McDonald, in that DOI's statutory authority to conduct criminal investigations should not be circumscribed by a supervening arbitration process.

By its dismissal of the Petition, the majority has effectively accorded to an arbitrator the power to dictate how DOI, an independent law enforcement agency performs its statutorily prescribed mission. This type of interference was rejected by the Court of Appeals in Honeoye Falls - Lima Central School District v. Honeoye Falls - Lima Education Association, 49 N.Y.2d 732, 734 (1980), when it affirmed a stay of arbitration on public policy grounds after a school board surrendered through collective bargaining a responsibility vested in it to maintain adequate standards in the classrooms. In Honeoye Falls, the contract at issue required layoff in reverse order of seniority in the entire school district in contravention of Education Law, section 2510, subsection 2, which required that the seniority criteria be limited to the tenure area of the position to be abolished. Noting that the purpose of the statute was to maintain teaching proficiency so as to better serve the public need, the Court stated, "[i]t is beyond the power of a school board to surrender through collective bargaining a responsibility vested in the board in the interest of maintaining adequate standards in the classrooms. . . ." 49 N.Y.2d at 734.

Likewise, placing DOI's investigations in the arbitral forum would circumscribe DOI's statutorily conferred investigatory and law enforcement powers. The finding of arbitrability herein will further violate public policy in that it will, of necessity, imply the capacity of individual City agencies to surrender or abandon, through the collective bargaining process,

DOI's authority and responsibility to determine, adopt and maintain such professional law enforcement standards and practices as will best serve the compelling public interest in the fulfillment of its statutorily prescribed mission to detect and eliminate corruption and misconduct in these same City agencies.

DOI must be allowed to carry out its responsibilities free of restraints imposed by collective bargaining or consequent arbitration. It would violate public policy to allow the process of arbitration to impinge upon DOI's law enforcement obligations or to interfere with the substantial public interest in the effective investigation and detection of corruption and wrongdoing by public employees and those in business with the City.

Dated: December 18, 1997
New York, New York

SAUL KRAMER
MEMBER

RICHARD WILSKER
MEMBER